

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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CAPE JASMINE COURT TRUST,
Plaintiff
v.
CENTRAL MORTGAGE COMPANY;
MTC FINANCIAL, INC. DBA
TRUSTEE CORPS; EVELYN DAVID,
RACHEL RIVERA, AND MARIA
PABLICO,
Defendant

Case No. 2:13-cv-1125-APG-CWH

ORDER REGARDING MOTIONS TO DISMISS

(Dkt. ##12, 14)

CENTRAL MORTGAGE COMPANY;
MTC FINANCIAL, INC. DBA
TRUSTEE CORPS; EVELYN DAVID,
RACHEL RIVERA, AND MARIA
PABLICO.

Defendants.

Plaintiff Cape Jasmine Court Trust (“Cape Jasmine”) purchased the property at issue in this case after SBH Community 3 (“HOA”) foreclosed on its lien against the property. Cape Jasmine contends that the foreclosure extinguished a first position deed of trust lien held by defendant Central Mortgage Company (“CMC”) because the HOA’s lien enjoyed a “super priority” over CMC’s deed of trust under NRS 116.3116(2). CMC has moved to dismiss Cape Jasmine’s Complaint, arguing that the statute creates only a payment priority for the HOA lien but does not upset the “first in time” lien priority afforded to its deed of trust. [Dkt. #14.] Because the plain language of the statute creates a super priority for the HOA’s lien, not just for payment, the motion must be denied.

Defendant MTC Financial Inc. dba Trustee Corps (“MTC”) has moved to dismiss Cape Jasmine’s claims against it because MTC claims no estate or interest in the subject property. [Dkt. #12.] Because MTC claims no interest in the property, it is entitled to dismissal.

I. BACKGROUND

On November 23, 2005, the HOA recorded Covenants Conditions and Restrictions (“CC&Rs”) that encumber the real property that is the subject of this lawsuit (the “Property”). [Dkt. #14-3.] The Property was previously owned by Evelyn Davis, Rachel Rivera, and Maria

1 Publico (collectively, “Borrowers”), who borrowed money from First National Bank of Arizona
 2 for the purchase. That mortgage loan was secured by a Deed of Trust (“DOT”) encumbering the
 3 Property. In April 2012, all beneficial interest in the DOT was transferred to CMC. In January
 4 2013, defendant MTC substituted in as Trustee under the DOT.

5 Because the HOA had recorded the CC&Rs before the DOT was recorded, both CMC and
 6 First National Bank of Arizona had actual or constructive knowledge of the CC&Rs at the time
 7 they obtained their respective interests in the DOT.

8 In February 2010, the HOA recorded a Notice Lien against the Property. The assessments
 9 purportedly included common expenses due during the nine months immediately preceding
 10 recordation of the lien (the “super-priority assessments”). On March 14, 2011, a Notice of
 11 Default and Election to Sell was recorded. CMC failed to cure any amount of the HOA lien. The
 12 HOA foreclosed on its lien, and Jumping Jacks Avenue Trust purchased the Property at the May
 13 25, 2012 foreclosure sale. Cape Jasmine purchased the Property from Jumping Jacks Avenue
 14 Trust on June 18, 2012.

15 On February 25, 2013, MTC recorded a “Notice of Breach and Default and of Election to
 16 Cause Sale of Real Property Under Deed of Trust,” threatening to foreclose upon the Property
 17 under CMC’s DOT. Cape Jasmine contends that CMC’s DOT was extinguished by the HOA
 18 foreclosure, under NRS 116.3116. Thus, Cape Jasmine seeks a declaration from this Court that it
 19 is the rightful owner of the Property free and clear of any liens, claims or encumbrances from the
 20 defendants. CMC now moves to dismiss Cape Jasmine’s Complaint with prejudice, arguing that
 21 Cape Jasmine’s claim to priority is based on an improper reading of NRS Chapter 116. [Dkt.
 22 #14.] MTC moves to dismiss because it claims no estate or interest in the subject Property, and
 23 thus should not be a party to this quiet title action. [Dkt. #12.]

24 **II. DISCUSSION**

25 **A. CMC’s Motion to Dismiss**

26 A court may dismiss a complaint for “failure to state a claim upon which relief can be
 27 granted.” Fed. R. Civ. P. 12(b)(6). “On a motion to dismiss, the court accepts the facts alleged in
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1 the complaint as true, and dismissal can be based on the lack of a cognizable legal theory or the
 2 absence of sufficient facts alleged.” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718
 3 F.3d 1006, 1014 (9th Cir. 2013) (internal quotations and citing references omitted).

4 Here, the legal dispute is whether an HOA lien foreclosure conducted under Nevada
 5 Revised Statutes Chapter 116 extinguishes all junior liens (including a first-position Deed of
 6 Trust), or whether the statute creates merely a payment priority without changing the lien priority.
 7 Cape Jasmine argues for the former interpretation while CMC insists the latter interpretation is
 8 correct.

9 The Nevada Supreme Court has not addressed the statutory provisions at issue here.
 10 “Where the state’s highest court has not decided an issue, the task of the federal courts is to
 11 predict how the state high court would resolve it.” *Giles v. Gen. Motors Acceptance Corp.*, 494
 12 F.3d 865, 872 (9th Cir. 2007) (quotation omitted). “In answering that question, this court looks
 13 for ‘guidance’ to decisions by intermediate appellate courts of the state and by courts in other
 14 jurisdictions.”¹ *Id.* (quotation omitted).

15 The Court also looks to Nevada rules of statutory construction to determine the meaning
 16 of a Nevada statute. *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 527 (9th Cir. 2001). Under
 17 Nevada law, a court should construe a statute to give effect to the legislature’s intent. *Richardson*
 18 *Constr., Inc. v. Clark Cnty. Sch. Dist.*, 156 P.3d 21, 23 (Nev. 2007). If the statute’s plain
 19 language is unambiguous, that language controls. *Id.* If the statute’s language is ambiguous, the
 20 Court “must examine the statute in the context of the entire statutory scheme, reason, and public
 21 policy to effect a construction that reflects the Legislature’s intent.” *Id.*

22 NRS Chapter 116, Nevada’s version of the Uniform Common-Interest Ownership Act,
 23 sets forth the statutory framework for common interest communities such as HOAs. Nev. Rev.
 24 Stat. § 116.001; A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). Section 116.3116(1)

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 26 ¹ The Court is particularly persuaded by the reasoning of the Honorable Jerome Tao, Eighth
 27 Judicial District Court of Clark County, Nevada, in *First 100, LLC v. Ronald Burns, et al.*, No.
 28 A677693 (8th Jud. D. Nev. Dept. XX, May 31, 2013), and by the Honorable Philip Pro, District
 of Nevada, in *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., et al.*, No. 2:13-cv-506-
 PMP-GWF (D. Nev. Oct. 28, 2013).

1 allows the HOA to record a lien “for any construction penalty that is imposed against the unit’s
2 owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed
3 against the unit’s owner from the time the construction penalty, assessment or fine becomes due.”
4 Recording the HOA’s declaration of CC&Rs “constitutes record notice and perfection of the lien.
5 No further recordation of any claim of lien for assessment under this section is required.” *Id.* at §
6 116.3116(5). Additionally, unless the CC&Rs provide otherwise, “any penalties, fees, charges,
7 late charges, fines and interest charged pursuant to [§ 116.3102(1)(j)-(n)] are enforceable as
8 assessments under this section.” Nev. Rev. Stat. § 116.3116(1); *see also* § 116.3102(1)(j)-(n)
9 (providing for charges for such items as late payment penalties, rental fees for common elements,
10 and fines).

11 Section 116.3116(2) elevates the priority of the HOA lien over other liens. The HOA lien
12 is prior to all other liens on the property *except*:

13 (a) Liens and encumbrances recorded before the recordation of the declaration^[2] and, in a
14 cooperative, liens and encumbrances which the association creates, assumes or takes
15 subject to;

16 (b) A first security interest on the unit recorded before the date on which the assessment
17 sought to be enforced became delinquent . . . ; and
18 (c) Liens for real estate taxes and other governmental assessments or charges against the
unit or cooperative.

19 Thus, a first deed of trust has priority over an HOA lien under § 116.3116(2)(b). However, the
20 last paragraph of § 116.3116(2) gives what is commonly referred to as “super priority” status to a
21 portion of the HOA’s lien, making that portion superior to the first deed of trust:

22 The [HOA] lien is also prior to all security interests described in paragraph (b) to the
23 extent of any charges incurred by the association on a unit pursuant to NRS 116.310312^[3]
24 and to the extent of the assessments for common expenses based on the periodic budget
adopted by the association pursuant to NRS 116.3115 which would have become due in
the absence of acceleration during the nine months immediately preceding institution of

²⁶ ² The declaration is “any instrument[], however denominated, that create[s] a common-interest community, including any amendments to th[at] instrument[].” Nev. Rev. Stat. § 116.037.

³ Allowing for the HOA's executive board to enter a unit to conduct maintenance or remove or abate a nuisance, and permitting the imposition of fees and costs for any such activity.

1 an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan
 2 Mortgage Corporation or the Federal National Mortgage Association require a shorter
 3 period of priority for the lien. . . . This subsection does not affect the priority of
 4 mechanics' or materialmen's liens, or the priority of liens for other assessments made by
 5 the association.

6 *Id.* at § 116.3116(2) (emphasis added).

7 To recover unpaid assessments, the HOA may pursue a civil suit directly against the unit
 8 owner, or it may foreclose on its lien created under § 116.3116. *Id.* at §§ 116.3116(6), (10),
 9 116.31162. Should the HOA choose to conduct a foreclosure sale to collect on its lien, the HOA
 10 must comply with certain notice requirements. First, the HOA must notify the owner of the
 11 delinquent assessments. *Id.* at § 116.31162(1)(a). If the owner does not pay within 30 days, the
 12 HOA must record a notice of default and election to sell. *Id.* at § 116.31162(1)(b). In addition to
 13 recording the notice of default, the HOA must mail the notice of default to: (1) a person of
 14 interest, i.e. "any person who has or claims any right, title or interest in, or lien or charge upon,"
 15 who "has requested notice," (2) "[a]ny holder of a recorded security interest encumbering the
 16 unit's owner's interest who has notified the association, 30 days before the recordation of the
 17 notice of default, of the existence of the security interest," and (3) "[a] purchaser of the unit,"
 18 providing that the unit owner notified the HOA of the contract of sale 30 days prior to the
 19 recording of the notice of default. *Id.* at §§ 116.31163(1-3), 107.090(1). If the unit owner does
 20 not pay the lien amount within 90 days of the notice of default being recorded, the HOA then
 21 must give notice of the sale to the owner and to all known holders of a security interest who have
 22 "notified the association, before the mailing of the notice of sale, of the existence of the security
 23 interest." *Id.* at §§ 116.311635(b)(2), 116.31162(1)(c).

24 At the sale, the HOA may credit bid on the property "up to the amount of the unpaid
 25 assessments and any permitted costs, fees and expenses incident to the enforcement of its lien."
 26 *Id.* at § 116.31164(2). After the sale, the seller must execute and deliver to the buyer "a deed
 27 without warranty which conveys to the grantee all title of the unit's owner to the unit." *Id.* at §§
 28 116.31164(3)(a), 116.31166(3). The seller must apply the proceeds of the sale in the following
 order:

- 1 (1) The reasonable expenses of sale;
- 2 (2) The reasonable expenses of securing possession before sale, holding, maintaining, and
- 3 preparing the unit for sale, including payment of taxes and other governmental charges,
- 4 premiums on hazard and liability insurance, and, to the extent provided for by the
- declaration, reasonable attorney's fees and other legal expenses incurred by the
- association;
- 5 (3) Satisfaction of the association's lien;
- 6 (4) Satisfaction in the order of priority of any subordinate claim of record; and
- 7 (5) Remittance of any excess to the unit's owner.

9 *Id.* at § 116.31164(3)(c). “The sale of a unit pursuant to NRS 116.31162, 116.31163 and
10 116.31164 vests in the purchaser the title of the unit’s owner without equity or right of
11 redemption.” *Id.* at § 116.31166(3). A deed containing the proper recitals “is conclusive against
12 the unit’s former owner, his or her heirs and assigns, and all other persons.” *Id.* at § 116.31166(2).

13 Based on the unambiguous language of section 116.3116(2), the statute potentially
14 separates the HOA’s lien into two liens. The last paragraph of subsection 2 elevates to a super
15 priority position the last nine months of unpaid assessments and any unpaid nuisance abatement
16 costs. The remainder of the HOA’s lien, including any charges not contained within the super
17 priority portion of the lien, is relegated to a position junior to the first deed of trust. *Id.* at §
18 116.3116(2)(b). The parties generally agree the statute bifurcates the HOA lien into two separate
19 liens, but they disagree whether the HOA’s foreclosure on the super priority portion of the lien
20 extinguishes all other liens. In other words, does NRS § 116.3116(2) create a lien priority or
21 merely a payment priority?

22 Nevada’s statutory scheme is clear. Section 116.3116(2) unambiguously provides that the
23 HOA super priority lien is prior to the first deed of trust. The statute also unambiguously permits
24 the HOA to use non-judicial foreclosure procedures to enforce its lien. The statute sets forth the
25 order of priority by which the seller must distribute the foreclosure sale proceeds, and specifically
26 provides that the association’s lien must be satisfied before any other subordinate claim of record.
27 The statute also provides that the purchaser at an HOA foreclosure sale obtains the unit owner’s
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1 title without equity or right of redemption, and a deed which contains the proper recitals “is
 2 conclusive against the unit’s former owner, his or her heirs and assigns, and all other persons.” *Id.*
 3 at § 116.31166(2). *Compare* Nev. Rev. Stat. § 107.080 (providing that a mortgage foreclosure
 4 sale “vests in the purchaser the title of the grantor and any successors in interest without equity or
 5 right of redemption”); *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867)
 6 (providing that such a sale “without equity or right of redemption” vests in the purchaser
 7 “absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase;
 8 and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all
 9 equity of redemption as completely as a decree of court”). Consequently, a foreclosure sale on
 10 the HOA super priority lien extinguishes all junior interests, including the first deed of trust.

11 CMC’s argument that Chapter 116 creates merely a payment priority and cannot
 12 extinguish a deed of trust is untenable. Even if these statutory provisions do not explicitly
 13 provide that foreclosure of the HOA super priority lien extinguishes the first deed of trust, §
 14 116.1108 provides that general principles of law and equity “supplement the provisions of this
 15 chapter, except to the extent inconsistent with this chapter.” Under well-settled foreclosure
 16 principles, the foreclosure of a superior lien extinguishes all junior security interests. *Aladdin*
 17 *Heating Corp. v. Trustees of Central States*, 563 P.2d 82, 86 (Nev. 1977); *Erickson Constr. Co. v.*
 18 *Nev. Nat’l Bank*, 513 P.2d 1236, 1238 (Nev. 1973). Junior lienholders wanting to avoid this
 19 result can preserve their security interests by buying out the senior lienholder’s interest. *See*
 20 *Carrillo v. Valley Bank of Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*,
 21 611 P.2d 1079, 1083 (Nev. 1980).

22 This result is consistent with the Legislature’s statutory purpose of the super priority lien
 23 to “ensure prompt and efficient enforcement of the association’s lien for unpaid assessments.”
 24 Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982); *see also* Nev. Rev. Stat. §
 25 116.1109(2) (“This chapter must be applied and construed so as to effectuate its general purpose
 26 to make uniform the law with respect to the subject of this chapter among states enacting it.”).
 27 The Nevada Legislature presumably was aware of the normal operation of foreclosure law when
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1 it enacted Chapter 116 in 1991. If the Legislature intended a different rule to apply to an HOA
 2 foreclosure sale, it could have so indicated.

3 CMC cites to various state and federal district court decisions holding that the statute
 4 creates a payment priority rather than a lien priority, contrary to those decisions cited in footnote
 5 above. Although judges in the Nevada state trial courts and judges in this federal district court
 6 are divided on the question, guidance from other Nevada sources confirms the Court's conclusion
 7 about the meaning of this statutory scheme. The Nevada Real Estate Division of the Department
 8 of Business and Industry ("NRED") has interpreted this statute to mean that foreclosure on the
 9 HOA super priority lien results in extinguishment of all junior liens, including the first deed of
 10 trust. [Dkt. #1-8, Ex. 11 at 1.] According to the NRED, the "ramifications of the super priority
 11 lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens.
 12 An association can foreclose its super priority lien and the first security interest holder will either
 13 pay the super priority lien amount or lose its security." [Id. at 9.] In its conclusion, the NRED
 14 stated that the "association can use the super priority lien to force the first security interest holder
 15 to pay that amount." [Id. at 19.] The HOA retains a junior lien for other charges and penalties; if
 16 the first lienholder pays off the super-priority lien amount, it may foreclose on its lien and
 17 extinguish the HOA's junior lien for items not afforded super-priority status under the statute.
 18 [Id.]

19 The NRED is the entity charged with interpreting Chapter 116. *State, Dep't of Bus. &*
 20 *Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 294 P.3d 1223, 1227-28 (Nev. 2012); *see also*
 21 Nev. Rev. Stat. §§ 116.043, 116.615, 116.623. The Nevada Supreme Court therefore would defer
 22 to the NRED's interpretation so long as that interpretation is within the statute's language.
 23 *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 191 P.3d 1159, 1165 (Nev. 2008); *Folio*
 24 *v. Briggs*, 656 P.2d 842, 844 (Nev. 1983) (the Nevada Supreme Court "attach[es] substantial
 25 weight" to the interpretation of a state agency "clothed with the power to construe the statutes
 26 under which it operates").

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1 Finally, CMC argues that the Court's interpretation of the statute leads to unreasonable
 2 results because an HOA lien of relatively little value should not be able to extinguish a first deed
 3 of trust of considerable value. The plain and unambiguous statutory language (not the relative
 4 monetary values of the respective liens) controls. Moreover, this interpretation of the statute is
 5 neither novel nor unfair. CMC easily could have avoided this purportedly inequitable
 6 consequence by paying off the HOA super priority lien amount to preserve its priority position,
 7 thereby avoiding extinguishment of its lien. Alternatively, CMC could have required an escrow
 8 for HOA assessments so that in the event of default, CMC could have satisfied the super priority
 9 lien amount without having to expend any of its own funds. *See Uniform Common Interest*
 10 *Ownership Act* § 3-116, cmt. 1 (1982); *see also* NRS § 116.3116(3). The HOA lien foreclosure
 11 extinguished only CMC's security interest in the property, not the underlying debt. *Olson v.*
 12 *Iacometti*, 533 P.2d 1360, 1363 (Nev. 1975) ("Foreclosure of the first trust deed extinguished
 13 only the security for the . . . note, not the indebtedness represented by that note."). CMC still can
 14 pursue the Borrowers for the unpaid balance. The Court's interpretation of the plain language of
 15 the statute does not create the inequitable result of which CMC complains.

16 **B. MTC's Motion to Dismiss**

17 Cape Jasmine's Complaint seeks a declaration under NRS 40.010 that none of the
 18 defendants has any right, title, interest or claim to the Property. Defendant MTC argues that it
 19 should be dismissed from this case because it does not have and does not claim any interest in the
 20 Property. NRS §40.010 states that "[a]n action may be brought by any person against another
 21 who claims an estate or interest in real property, adverse to the person bringing the action, for the
 22 purpose of determining such adverse claim." Because MTC claims no estate or interest in the
 23 Property whatsoever, it should not be a party to this lawsuit.

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III. CONCLUSION

IT IS THEREFORE ORDERED that CMC's Motion to Dismiss [Dkt. #14] is DENIED.

IT IS FURTHER ORDERED that MTC's Motion to Dismiss [Dkt. #12] is GRANTED.

DATED THIS 31st day of March 2014.


ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE